TAWANDA MUNGATE
and
KENNETH MUSHAIKWA
versus
GLORIA TAKUNDWA (N.O)
and
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 4 March, 2019 & 5 April, 2019

Opposed Application

L Ziro, for the applicants
No appearance, for 1st respondent
H Muromba, for 2nd respondent

MANGOTA J: I heard this application on 4 March, 2019. I dismissed it by way of an *ex tempore* judgment.

On 13 March, 2019 the applicants addressed a letter to the registrar of this court. They advised that they are appealing my decision. They requested for reasons for the same. These are they:

The first applicant is the owner of a Nissan Vanette motor car. The second applicant owns a Mitsubishi Delica motor vehicle. The respective registration numbers of the two cars are ADK 0694 and ABU 6387. The applicants are applying for a declaratur. They state that they left the cars in the possession of one Calistas Musinyakore, a mechanic, who operates his business at Mashakada Business Centre in Beitbridge. They allege that they left the cars for repair and service. They aver that, on 12 October 2015, they went to pay, and collect their cars from, the mechanic. They allege that they did not find the cars or the mechanic. They state that, on 14 October 2015, they received information which was to the effect that the second respondent's officials had seized cars . They say the officials told them that the cars had been used in the unlawful transportation of two hundred and twenty (220) Chelsea boxes of cigarettes which were liable for excise duty which had not been paid. They allege that they assisted the second respondent's officials to track down and locate the owner of the cigarettes.

The applicants aver that their assistance led to the arrest of one Richard Tafirei. They say he has since been convicted by the magistrates' court, Beitbridge on a charge of contravening s 184 (e) of the Customs and Excise Act. His conviction, they state, led to the forfeiture of their cars. They couched their draft order for a declaratur in the following terms:

> "WHEREUPON after reading documents filed of record and hearing counsel:
> IT IS ORDEED AND DECLARED THAT:
> 1. The operative part of the judgment or order of the court a *quo* ordering seizure and forfeiture of the motor vehicles Nissan Vanette registration number ADK 0694 and Mitsubishi Delica Registration number ABU 6387 is hereby set aside.
> 2. The motor vehicle Nissan Vanette registration number ADK 0694 and Mitsubishi Delica Registration number ABU 6387 currently in possession of the respondents shall be released and surrendered to the appellants (sic) by the respondents within three (3) days of granting of this order without need or obligation to pay storage costs.
> 3. 2nd respondent to pay costs of suit if (sic) opposes application."

They state, as a reason for the application, that they were not involved in the illegal transportation of the cigarettes. They allege that Richard Tafirei did not hire the cars from them. They aver that they were not aware of his illegal activities and that they were neither charged with, nor convicted of, any crime. They insist that the order of forfeiture violates their constitutional right to a fair hearing as well as their right to own the property and not to be unlawfully deprived of the same.

The second respondent opposes the application. The first respondent does not. My assumption is that she intends to abide by my decision.

The second respondent's in *limine* matters are that:

(i) the applicants did not comply with s 196 of the Customs and Excise Act;

(ii) it was misjoined to the application and the applicants' claim as against it ought to be dismissed with costs;

(iii) the applicants used the wrong procedure when they seek a declaratur which has the effect of setting aside the decision of the Criminal Court in relation to the forfeiture of the vehicles;

(iv) the applicants did not plead their cause of action against it.

Its statement, on the merits, is substantially similar to what it raised in its preliminary matters save for the assertion which is to the effect that the forfeiture of the motor vehicles was lawfully done. It moves the court to dismiss the application with costs which are on the higher scale.

It is common cause that the cars which are the subject of this application were used in the commission of the crime. It is also common cause that, upon conviction of the person who used

the cars in pursuance of an illegal purpose, the court a *quo* declared the cars forfeited to the state. It justifies its conduct on s 188 (2) (b) of the Customs and Excise Act, [Chapter 23:01] ("the Act").

That the applicants were not heard when the court ordered forfeiture of their cars to the state requires little, if any, debate. Indeed , the court which reviewed the proceedings of the court a *quo* sought to understand the issue which related to the forfeiture of the cars. It wrote as follows on the matter:

> "can the learned magistrate refer to the precise section through which forfeiture was ordered and show that the forfeiture order meets the criteria in the relevant legislation"

The court a *quo'*s response to the query which had been raised was a clear mis-statement. It reads, in the relevant portion, as follows:

> "…..with regard to the two vehicles, the court relied on s 188 (2) (b) of the Customs and Excise Act when forfeiture was ordered.
> The forfeiture meets the criteria laid down in s 209 (3) (c) (ii) of the Customs and Excise Act. The Court was satisfied that there are good reasons why the owners of the two vehicles concerned can (sic) be given an opportunity of being heard. The reason being that <u>when the accused hired the vehicles in Harare the owners were aware of the nature of the goods to be transported</u> in contravention of the Customs and Excise Act. This is the reason why the court did not give (sic) an opportunity to be heard" (emphasis added)

The trial magistrate does not explain how he came to the conclusion that the cars were hired by the accused from the applicants. He also does not explain what prompted him to say that the applicants were aware of the nature of the goods which Richard Tafirei would transport in their cars. The court a *quo's* record of proceedings which was attached to this application makes no reference at all to what the trial magistrate stated in response to the query which the court raised with him.

The response of the trial magistrate persuaded the learned reviewing judge to confirm the proceedings of the court a *quo* as having been in accordance with real and substantial justice. The order of forfeiture of the two cars was, therefore, confirmed together with the rest of the sentence which the trial magistrate imposed on Richard Tafirei. The magistrate's order is, accordingly, extant.

It is trite that an extant court order cannot be set aside by a declaratory order which the applicants are moving the court to grant to them. An extant order of court can only be set aside in any one of the following three methods:

(i) an appeal which is successfully argued; or

(ii) a review which is also successfully argued; or

(iii) a successful application for rescission of judgment.

Outside the abovementioned three methods, I remain constrained to know of any other way in which a court is conferred with the power or authority to set aside a properly entered court order or a portion thereof. The application in which I am being moved to set aside the order of the magistrate or a portion thereof by way of a declaratur is, in my view, misplaced. I have neither the power nor the will to sanction what appears to me to be an unorthodox manner of disturbing a properly issued court order.

It is for the abovementioned reason, if for no other, that I associate myself with the second respondent's third *in limine* matter which is to the effect that the applicants used the wrong procedure to prosecute their case. The declaration which aims at setting aside a portion of the magistrate's order cannot be made in the circumstances of this case. It is not provided for in the rules of court or in the law of civil practice and procedure. It simply does not appear to exist and, if it does, it is not known to me. I cannot, therefore, sanction what is outside the law.

An application for a declaratur would have held if the seizure of the motor vehicles resulted from the conduct of the second respondent. It would have held on the basis that the applicants were able to show that the cars belong to them.

The record shows that, at some point, the applicants made a concerted effort to appeal the decision of the magistrate. Reference is made in this regard to their:

(i) application for late noting of appeal under HC 743/18 – and

(ii) the notice of set down of HC 743/18.

The application and the notice of set down of HC 743/18 appear respectively at pages 45 and 121 of the record. The applicants, for reasons known to themselves, abandoned the stated route when they appeared before NDEWERE J before whom they withdrew HC 743/18.

The intended appeal was the correct course of action for them to have taken. It had, as parties to it, the applicants, the state whom they cited as the first respondent and the current second respondent both of whom had a direct and substantial interest in the subject matter of the appeal.

Because the criminal, and not the civil, court ordered forfeiture of the cars, it stands to good logic and sound reason that the applicants' case should have been allowed to remain within the realms of the criminal law. The appeal would, therefore, have had the effect of resolving the issue of the cars in a very conclusive manner. The applicants could have taken advantage of s 209 (3)

(b) (i) as read with subs (6) of the same section of the Customs and Excise Act and successfully prosecuted their appeal. They would have lodged their appeal as directed by s 209 (3) (b) (i) of the Act. They would have stated, as their grounds of appeal, that:

(a) the court *a quo* should not have declared their motor vehicles forfeited to the state without having heard them;

(b) the motor vehicles are not the property of the convicted person;

(c) the cars belong to them;

(d) they were not aware that the convicted person would use the cars for illegal transportation of his goods – and

(e) they could not prevent the use to which the convicted person put their motor vehicles.

They stated all the abovementioned matters in their application for a declaratur. The same matters form the substance of what they could have stated in their appeal as dictated by s 209 (3) (b) (i) of the Act.

Section 209 (6) of the Customs and Excise Act conferred *locus standi* on the applicants to appeal the decision of the magistrate as they should have done. It reads, in the relevant part, as follows:

> "(6) Where the owner of any articles which have been declared forfeited to the State in terms of subparagraph (i) is aggrieved by the decision of the court as to the forfeiture thereof, <u>he may appeal therefrom as if</u> it were a conviction by the court making the declaration". (emphasis added).

The applicants had the discretion to appeal the portion of the court *a quo*'s order which declared forfeiture of their vehicles. Section 209 (7) allows the convicting court to alter its sentence under the circumstances which are spelt out in s 209 (6) of the Act to reflect that the order of forfeiture which has been set aside in terms of the appeal is no longer part of the sentence which remains imposed on the convicted person. It reads:

> "(7) If any declaration in terms of subparagraph (i) of paragraph (b) of subsection (1) is set aside or varied, the court convicting the person concerned may thereafter give summary judgment in terms of subparagraph (ii) of paragraph (b) of subsection (1)."

Further reading of the relevant law shows that the applicants' other avenue lay in their use of s 62 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Subsection (4) of the section as read with the proviso to subs (1) is relevant. It reads, in the relevant portion, as follows:

"(4) Any judge or magistrate of the court in question may at any time within a period of three years from the date of declaration of forfeiture of an article in terms of subsection (1), upon the application of any person, other than the accused, who claims that any right referred to in paragraphs (a) or (b) is vested in him, inquire into and determine any such right and, if the court finds that facts referred to in the proviso to subsection (1) are proved and that the article –

(a) is the property of the applicant, the court shall –

(i) set aside the declaration of forfeiture and direct that the article be returned to such person; or

(ii) ……". (emphasis added)

The applicants were at liberty to have invoked the above cited subsection of s 62 of the Criminal Procedure and Evidence Act on the basis of which they would have filed an application with the court of the magistrate who declared their cars forfeited to the State for his consideration. All they required to establish as contained in the proviso to subs (1) of s 62, was that they did not know that the convicted person would use their cars for the purpose of, or in connection with, the commission of the offence he was convicted of and that they could not, under the circumstances of their case, prevent such use as well as that they may lawfully possess their cars.

Where, after due inquiry, the court *a quo* remained dis-satisfied with the applicants' statement as asserted by them in the foregoing paragraph to a point where it dismissed their application, subs (5) of s 62 of the Criminal Procedure and Evidence Act allowed them to appeal the decision of the court. It reads:

"(5) If a determination by the court of an application in terms of subsection (4) is adverse to the applicant, he may appeal therefrom as if it were a conviction by the court making the determination , and such appeal may be heard either separately or jointly with an appeal against the conviction as a result whereof the declaration of forfeiture was made or against sentence imposed as a result of such conviction". [emphasis added]

The applicants, it is evident, had *locus standi* to appeal in terms of the Customs and Excise Act. They also had the same *locus* to approach the court *a quo* through an application which they could have filed in terms of s 62 of the Criminal Procedure and Evidence Act with the right of appealing the court *a quo's* decision where it turned down their application.

Because of the three-year bar which remains operative against the applicants now, s 62 of the Criminal Procedure and Evidence Act is no longer available to them. The cars were declared fortified to the state on 2 February, 2016. They should, in terms of s 62 (4) of the Criminal Procedure and Evidence Act, have filed their application with the court *a quo* on 2 February, 2019. The three-year period which is stipulated in subsection (4) of s 62 of the Criminal Procedure and

Evidence Act lapsed on the mentioned date. They are forty (40) working days outside the prescribed period of time.

The applicants would have saved their day if, instead of filing this application, they had applied in terms of s 62 of the Criminal Procedure and Evidence Act. They would also have done justice to their case if they did not withdraw their appeal. What they did is akin to what is normally referred to as self-inflicted injury. They blame no one for their failure to observe the obvious and pursue what was/is within their best interest to its final conclusion.

The issue of the applicants' compliance with s 196 of the Customs and Excise Act remains debatable. The second respondent's statement on the same is that they did not serve a proper notice of their application to it. It alleges that they violated provisions of the State Liabilities Act [*Chapter 8:15*] in the mentioned regard.

The applicants maintain a contrary view on the same. They insist that they gave the requisite notice to the second respondent of their intention to sue it. They, in the mentioned regard, refer to the letter which they addressed to the second respondent on 17 November, 2017. The relevant portion of the letter which appears at p 47 of the record reads:

> "This letter however has been simply written in compliance with s 196 of the Customs and Excise Act 23:02 as it is our client's intention to institute legal proceedings and appeal- against the judgment by the magistrate and request release of those vehicles."

They insist, on the strength of the above, that the second respondent was made aware of the material facts of their claim and has had ample opportunity to settle the matter which related to the cars or protected itself against wrongful action.

Section 196 of the Act upon which the second respondent places reliance states that:

> "No civil proceedings shall be instituted against the state, the Commissioner or an officer for anything done or omitted to be done by the Commissioner or an officer under this Act or any other law relating to customs and excise until sixty days after notice has been given in terms of the State Liabilities Act [*Chapter 8:15*] [emphasis added]

It is trite that the notice which the applicants served upon the second respondent on 17 November, 2017 was in contemplation of their intention to appeal the decision of the court *a quo* which determined the conviction of Richard Tafirei under the criminal law as opposed to the civil law discipline. The question which begs the answer is does the notice which the applicants gave in contemplation of prosecuting a criminal appeal suffice for purposes of s 196 of the Customs and Excise Act. *A fortiori* when the section refers to civil, and not criminal, proceedings.

Ronald Machacha v *Zimbabwe Revenue Authority*, HB 186/11 does, in my view, provide a clear answer to the question. It, in effect, states that the primary objective of the notice is to offer to the second respondent timely opportunity to know as well as to investigate the material facts upon which its actions are challenged and to afford it the opportunity of protecting itself against the consequences of possible wrongful action by tendering early amends as envisaged by the Act.

It follows, from the foregoing, that the applicants' notice of 17 November, 2017 suffices although it was, in my view, misplaced. The court, and not the second respondent, ordered forfeiture of the cars to the State. The second respondent could not investigate anything or even be accused of any wrongful action by anyone. It held the cars by virtue of the court *a quo's* order. The issue of the notice being served upon the second respondent is, therefore, neither here nor there.

It is accepted that the second respondent was/is not one of the actors in the criminal prosecution of Richard Tafirei the conviction of whom resulted in the order of forfeiture of the applicants' cars to the State. It is accepted further that the second respondent was a witness in the criminal matter. However, its motion to have the application dismissed on the strength of its misjoinder to the same cannot hold.

The High Court Rules, 1971, are clear on the stated aspect of the case. Rule 87 of the same is relevant. It speaks to misjoinder or nonjoinder of parties. It states in the subrule that:

> "No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party…"

The cited rule, therefore, puts to rest the second respondent's second preliminary matter. It is without merit.

The fact of whether or not the applicants have a cause of action against the second respondent is debatable. They insist that they do. They state that they seek to set aside the order of forfeiture of their motor vehicles. They remain of the view that the same is not justified at law. They aver that they seek that their cars be returned to them subject to the order of forfeiture being set aside.

It is a fact that the second respondent retains possession of the cars which the court ordered fortified to the State. Because of the stated fact, its possession of the motor vehicles is lawful as opposed to it being unlawful. In the presence of the court *a quo's* order of forfeiture, therefore, the second respondent cannot release the cars to the applicants. It does not have the power to do so.

The statement of the second respondent which is to the effect that the applicants do not have a cause of action against it cannot be impeached.

I have already made a finding which is to the effect that the order of forfeiture cannot be set aside through a declaratur. The applicants' statement which is to the effect that the order of forfeiture is not justified at law is misplaced. *A forfiori* when the same came into existence in pursuance of the due process of the law.

The applicants failed to establish their case on a balance of probabilities. They failed to make use of the lawful avenues which were available to them. They used the wrong procedure much to their detriment. The application is, accordingly, dismissed with costs.

Hungwe and Partners, applicants' legal practitioners
Kantor and Immerman, 2nd respondent's legal practitioners